

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTINE A MORILLAS, No C 07-4165 VRW  
Plaintiff, ORDER

v

MICHAEL J ASTRUE,  
Commissioner of Social Security,  
Defendant.

Plaintiff Kristine Morillas brings this action under 42  
USC § 405(g), challenging the final decision of the Social Security  
Administration (SSA) denying her application for supplemental  
security income (SSI). The parties have filed cross-motions for  
summary judgment. Based on a careful review of the administrative  
record under the applicable law, the court DENIES plaintiff's  
motion for summary judgment and GRANTS defendant's motion for  
summary judgment.

//

I

A

Morillas was born on October 29, 1953. She completed high school and worked as a bartender from approximately 1984 to 2000. Administrative Record (AR) 102, 107 (Doc #10). After she stopped working, Morillas took classes toward becoming a medical assistant. AR 138. She is 5'4" tall and weighed 231 pounds at the time of her hearing. AR 360. She alleges that she has been unable to work since February 27, 2001 because of degenerative disc disease of the cervical spine, chronic neck and back pain, osteoarthritis, obesity, hypertension, carpal tunnel syndrome (CTS), a wrist sprain and bilateral knee and foot pain. AR 97, 137. Morillas's medical records show that she is allergic to acetaminophen, an ingredient in Vicodin, and to codeine phosphate. AR 206, 305.

On February 26, 2001, Morillas saw Dr Devendra Chhatre, MD at Kaiser Permanente who noted symptoms of left neck and upper back pain, bilateral wrist pain which was more prominent in the left wrist and hand paresthesias. AR 202. Dr Chhatre recommended wrist splints at night, physical therapy, muscle relaxant medication and work modifications. AR 201. In October 2001, Dr Chhatre noted Tinel's and carpal compression tests as "faintly positive to the left." AR 175.

On March 5, 2001, Morillas's physical therapist reported that physical therapy had improved her condition and that she had good cervical and bilateral shoulder range of motion, improved left wrist range of motion and increased left grip. AR 198. In June 2001, a magnetic resonance imaging (MRI) scan of her cervical spine

1 showed mild degenerative disc disease between C5-6 and C6-7 with no  
2 evidence of central canal stenosis. AR 182.

3           On May 6, 2002, Dr B Ravi Nayak, MD, provided the first  
4 of four different medical assessments of Morillas's residual  
5 functional capacity (RFC)—a physical RFC evaluation in the context  
6 of Morillas's claim for worker's compensation. AR 235-39. Dr  
7 Nayak reported: normal range of motion in the neck, shoulders,  
8 elbows, fingers and ankles (AR 237-38); slight tenderness over the  
9 left upper trapezius muscle, but no trigger points or muscle spasm,  
10 no atrophy of the upper extremities and no motor weakness or  
11 sensory or reflex loss (AR 237); tenderness over both wrists, but  
12 normal range of motion and slight tenderness over the arch of the  
13 left foot (AR 238). Dr Nayak's review of nerve conduction studies  
14 only found "soft findings" but "no symptoms" of CTS and a loss of  
15 grip strength —34% in one hand, 40% in the other. AR 236, 239.  
16 He found that a Tinel's test was negative and though a Phalen's  
17 test was positive, the little finger was involved, which is  
18 inconsistent with a positive Phalen's test. AR 237. Dr Nayak  
19 diagnosed cervical myofascial pain syndrome, bilateral CTS in  
20 remission, bilateral wrist tendinitis and chronic left foot strain.  
21 AR 238. He assessed no work restrictions regarding the left foot  
22 but recommended no prolonged bending of the neck, no repetitive  
23 overhead work on the left side, no heavy lifting and no "forcible  
24 gripping" or repetitive manipulation. AR 238-39. While Morillas  
25 claimed she could only lift ten pounds, Dr Nayak wrote that he  
26 suspected that she could lift more. AR 239.

27           In September 2004, Dr Michael Louie, MD at Kaiser  
28 Permanente who had first treated Morillas in May 2000 (AR 212),

1 approved Morillas's request for a Department of Motor Vehicles  
2 Disabled Person Parking Placard. AR 153. In August 2005, after  
3 Morillas complained to Dr Louie of ankle weakness with toe  
4 numbness, he ordered a MRI exam of Morillas's lumbar spine that  
5 revealed no evidence of disc herniation or spinal stenosis. AR  
6 336.

7 In March 2005, at the request of the SSA, consultative  
8 physiatrist Dr L Neena Madireddi, MD examined Morillas at the Bay  
9 View Medical Clinic. AR 248-58. Dr Madireddi diagnosed Morillas  
10 with cervical and lumbar pain, chronic left knee and foot pain and  
11 morbid obesity. AR 248-50. Dr Madireddi opined that Morillas  
12 could: stand and walk cumulatively for at least four hours; sit  
13 cumulatively for at least six hours; lift ten pounds frequently and  
14 twenty pounds occasionally and kneel, climb and balance without  
15 restriction. AR 249. Dr Madireddi stated that Morillas should  
16 avoid overhead reaching and lifting and repetitive stooping,  
17 crouching and crawling activities because of back pain. AR 249.

18 In April 2005, also at the request of the SSA,  
19 consultative physician Dr Mark Tambellini completed Morillas's  
20 second RFC evaluation. AR 251-58. Dr Tambellini gave a primary  
21 diagnosis of cervical and lumbar pain and strain and a secondary  
22 diagnosis of fibromyalgia. AR 251. He opined that Morillas could  
23 stand and walk about six hours in an eight-hour workday and lift  
24 twenty pounds occasionally and ten pounds frequently. AR 252. Dr  
25 Tambellini stated, however, that Morillas should avoid overhead  
26 reaching and lifting and could only occasionally climb, stoop,  
27 kneel, crouch or crawl. AR 253-54. Dr Tambellini noted no  
28 limitations in handling or fingering. AR 254.

1 In April 2006, after the SSA had denied Morillas's  
2 application for SSI, Dr Luis Folan, MD from the Palo Alto Medical  
3 Foundation examined Morillas for the first time. AR 320-26. She  
4 presented with significant pain and swelling in the right knee. He  
5 noted Morillas's history of problems with her left knee. AR 322.  
6 Because of pain and swelling in the right knee, he ordered a MRI  
7 exam of the knee, suggested weight loss and referred Morillas to  
8 orthopedist Dr Raad Andrew Al-Shaikh, MD. Id. Dr Al-Shaikh's  
9 April 14, 2006, examination found normal range of motion and  
10 strength in the knee with some tenderness. AR 318. The MRI exam  
11 found a grade two sprain or partial tear involving the medial  
12 rentinaculum, but no evidence of meniscal tear (which would have  
13 severely restricted motion of the knee and required surgery for  
14 treatment). AR 290. The MRI exam also found a "presumed" ganglion  
15 cyst in the posterior of the knee, but it was "not completely  
16 evaluated." Id.

17 In June 2006, Morillas again sought treatment with Dr  
18 Folan who noted that Morillas had started working out at the gym  
19 and recommended further weight loss as a way to decrease her joint  
20 pain, which he thought was "mostly osteoarthritic in nature." AR  
21 304. Dr Folan offered to refer Morillas to the physical medicine  
22 department for her back pain, but Dr Folan reported that Morillas  
23 was "still contemplating whether or not seeing them would make any  
24 difference and will continue with her current exercise regimen."  
25 AR 305. After Morillas fell on her right arm and wrist in July  
26 2006, Dr Folan diagnosed a probable sprain (confirmed by x-ray) and  
27 noted decreased range of motion in her elbow but normal range of  
28 motion in her wrist. AR 300-01. When Morillas saw Dr Folan again

1 in July 2006 for a thumb fungal infection, he reviewed "some of the  
2 patient's health care maintenance issues," and in that context  
3 noted no musculoskeletal problems. AR 297.

4 On August 27, 2006, Dr Folan completed a physical RFC  
5 questionnaire, the third in Morillas's record, in which he reported  
6 diagnoses of osteoarthritis, obesity, hypertension, renal  
7 insufficiency and dermatophytosis of the nail. AR 340-49. He  
8 opined that Morillas could walk one city block without rest or  
9 severe pain, could sit for twenty minutes at a time and for a total  
10 of two hours in an eight-hour workday, could stand and walk for ten  
11 minutes about every fifteen minutes during an eight-hour workday  
12 and required a job that permitted shifting positions at will and  
13 unscheduled breaks. AR 341-42. He estimated that Morillas could:  
14 carry less than ten pounds occasionally; rarely crouch or squat and  
15 never stoop or climb. AR 342-43. He assessed significant  
16 limitations reaching, handling and fingering. AR 343.

17 In August 2006, orthopedist Dr Barry Rose, MD, on  
18 referral from Dr Folan, examined Morillas's right wrist and left  
19 knee. AR 282-87. Morillas acknowledged that pain, numbness and  
20 tingling in her wrist had "quieted down" and Dr Rose noted that her  
21 knee was "slowly improving." AR 285-86. He noted full range of  
22 motion in the wrist and fingers, but diagnosed persistent knee pain  
23 and discomfort, chondromalacia patella post medial collateral  
24 ligament (MCL) sprain and osteochondrosis of the medial femoral  
25 condyle, i e, a loss of blood supply to the bone. AR 285. Dr Rose  
26 also noted positive Tinel's and Phalen's tests for CTS. Id.

27 On September 8, 2006, Dr Louie completed the fourth  
28 physical RFC questionnaire in Morillas's record in a manner nearly

1 identical to Dr Folan's. AR 345-49. The same forms were used,  
2 presumably supplied by Morillas's legal counsel, and nearly  
3 identical responses filled in. Id. Dr Louie reported diagnoses  
4 of: chronic neck and back pain; CTS; knee osteoarthritis;  
5 tendinitis of the feet and trouble sleeping. AR 345. He indicated  
6 that Morillas had "constant pain" affecting the neck, back and  
7 knee, along with numbness of the hands. Id. He opined that  
8 Morillas could walk less than one city block without rest or severe  
9 pain, could sit only five minutes at a time and less than two hours  
10 in an eight-hour workday, could stand ten minutes at a time and  
11 less than two hours in an eight-hour workday and required a job  
12 that permitted shifting positions at will and unscheduled breaks.  
13 AR 346-47. He estimated that Morillas could: lift less than ten  
14 pounds occasionally; occasionally look down; rarely stoop, crouch  
15 or squat and never climb ladders or stairs. AR 347-48. But he  
16 assessed no significant limitations in reaching, handling or  
17 fingering. AR 348.

## B

19  
20 On January 28, 2005, Morillas applied for SSI alleging  
21 disability since February 27, 2001 due to pain in the lower back,  
22 neck, hands and foot and fibromyalgia. AR 27. Morillas was  
23 referred for the above-described physical examinations with Drs  
24 Madireddi and Trambellini, whose reports were sent to the SSA for  
25 review in connection with her application.

26 On May 6, 2005, the SSA sent notification that Morillas  
27 did not qualify for SSI, stating, inter alia, that "your condition  
28 is not severe enough to keep you from working." AR 27-31. After

1 the SSA denied Morillas's request for reconsideration, she  
2 requested a hearing before an ALJ. AR 36-43.

3 At the September 27, 2006 hearing, Morillas, represented  
4 by her counsel Betty Herrera, described her past work experience  
5 and her alleged disabilities. AR 358-411. Morillas testified that  
6 she had not worked for the last five years. AR 361. She explained  
7 that while working as a bartender, she "stocked the bar with cases  
8 of beer, changed the kegs of beer, poured cocktails, supervised the  
9 cocktail waitresses \* \* \*, worked a cash register, did the banking,  
10 \* \* \* took inventory of the liquor \* \* \* sold every night, put the  
11 bottles in a garbage can and put them on a dolly and carried them  
12 out to the garbage container \* \* \* every night." AR 362.

13 Morillas went on to describe her ailments. She stated  
14 that as a bartender she used a blender and bent her neck frequently  
15 which caused her to develop CTS and "pinched a nerve in her neck."  
16 AR 362. She stated, "My back pain is the worst because I can't sit  
17 up. I have to keep moving. It's just—it's unbearable." AR 364.  
18 Using a ten-point scale, with ten being the worst pain imaginable,  
19 Morillas described her back pain as a ten, her neck pain as a ten,  
20 her hand pain from a five to seven and her knee pain as a seven.  
21 AR 372-74. She stated that she could only sit for "between like  
22 five and ten minutes usually because I have two cysts on my right  
23 leg and I have to stand up because of my back." AR 366. She also  
24 claimed to be able to lift only one pound without difficulty. AR  
25 367. Morillas stated that she took 800 milligrams of ibuprofen  
26 (Motrin) three times a day, pentazocine lactate (Talwin) once a day  
27 at bedtime or when she was "really hurting," which occurred three  
28 or four times a month and cyclobenzaprine (Flexeril) when she had



1 spasms. AR 368. She stated that she was in "too much pain" to be  
2 able to work for the last five years or take more than one class at  
3 a medical assistant training school. AR 363.

4 Morillas then described difficulty with daily activities  
5 like doing household chores and taking care of personal needs, but  
6 stated she was still able to do them to a limited extent. AR 375-  
7 79. She could do dishes or vacuum for only about five minutes  
8 before needing to stop and needed two hours to shower because of  
9 neck pain. AR 372, 376-77. She stated that buttoning her pants  
10 was difficult because of CTS. AR 377. Morillas also stated that  
11 her pain caused her to wake up during the night. AR 379.

12 Following Morillas's testimony, the medical expert (ME),  
13 Dr Sherry Sonka-Maarek, MD, who is board-certified in Physical  
14 Medicine and Rehabilitation and Spinal Cord Injury Medicine, opined  
15 that Morillas's medical records did not contain evidence of level-  
16 ten pain. AR 383. Dr Sonka-Maarek stated, "The objective evidence  
17 does not support her complaints" because the evidence shows only  
18 "minimal to mild problems." AR 389. In her review of the record,  
19 she did not "see a confirmed diagnosis of [a] pinched nerve." AR  
20 382. She noted that Morillas's previous episode of CTS in 2001 was  
21 minimal, that it could not have gotten any worse since Morillas had  
22 not worked for the last five years and that she was not sure if  
23 Morillas was "ever fully given a solid diagnosis of carpal tunnel."  
24 AR 384-85. Dr Sonka-Maarek described Morillas's CTS as  
25 "questionable" and stated that the medical records provided  
26 "inconsistent" findings of CTS. AR 386, 392. She stated that MRI  
27 exams only showed minimal degenerative disk disease of the cervical  
28 spine and no disease in the lumbar spine. AR 385-86. Dr Sonka-

1 Maarek testified to the presence of "signs of exaggeration" in  
2 Morillas's complaints and stated that if she were Morillas's  
3 treating physician, "I would be giving her stronger pain  
4 medications, and I would be trying to be more aggressive in the  
5 treatment." AR 397-98. At the end of her testimony, she noted  
6 that the medications Morillas was taking "cause cognitive side  
7 effects." AR 397.

8           Next, vocational expert (VE) Susan Creighton-Clavel  
9 testified that Morillas carried out various job functions in her  
10 capacity as a bartender including bartending, stocking, cashiering,  
11 banking, accounting, security, janitorial work and waitressing. AR  
12 401-02. The ALJ posed a hypothetical to the VE describing a  
13 "younger individual"—i e, a person under fifty—with the same  
14 education and vocational background as Morillas who could "do light  
15 work with no overhead lifting, no overhead reaching, occasional  
16 stooping, kneeling, crouching and crawling, and occasional  
17 climbing" and asked whether such an individual could do Morillas's  
18 past work. AR 402. The VE stated that though Morillas would not  
19 be able to "do her past relevant work as she performed it,"  
20 Morillas could do "aspects of that job" such as waitressing,  
21 cashiering and hostessing. AR 402-03. But the VE opined that for  
22 a person who could only grasp, turn or twist twenty-five percent of  
23 the time, jobs such as waitressing or cashiering would be  
24 "completely eliminated." AR 405.

25           Then the ALJ posed another hypothetical to the VE and  
26 asked whether a person who could only lift ten pounds occasionally,  
27 stand and walk less than two hours in an eight-hour day,  
28 occasionally stoop, kneel, crouch, crawl and climb and do no

1 overhead reaching could do any of Morillas's past jobs. AR 406.  
2 The VE stated that such a person could work "sedentary cashier  
3 jobs" such as a check cashier, which exists in significant numbers  
4 in California and nationally. AR 406-07. The VE stated that such  
5 work would be "a little different" from Morillas's prior work, but  
6 that skills learned at her previous job, such as banking, could be  
7 transferred to a new one. AR 407-10.

8 On December 26, 2006 the ALJ rendered a decision adverse  
9 to Morillas. AR 11-21. The ALJ found that Morillas had not  
10 engaged in substantial gainful activity since February 27, 2001.  
11 AR 20. The ALJ found that Morillas suffered from degenerative disc  
12 disease of the cervical spine, chondromalacia patella, mild  
13 degenerative joint disease of the right knee and obesity, but no  
14 impairment that met or equaled the criteria of any impairment  
15 listed in 20 CFR Part 404, Subpart P, Appendix 1. Id.

16 The ALJ resolved conflicting medical reports and opinions  
17 and concluded that Morillas's current RFC allowed her to perform  
18 light work, lifting ten pounds frequently and twenty pounds  
19 occasionally with no overhead lifting but with occasional overhead  
20 reaching, stooping, kneeling, crouching, crawling and climbing and  
21 sitting, standing, or walking for six hours in an eight-hour  
22 workday. Id.

23 The ALJ concurred with the conclusions of the medical  
24 consultants Drs Nayak, Madireddi and Tambellini and ME Dr Sonka-  
25 Maarek and rejected the conclusions of treating physicians Dr Folan  
26 and Dr Louie. AR 19. The ALJ considered evidence of Morillas's  
27 daily activities, functional restrictions, use of medication and  
28 treatments and concluded that Morillas was exaggerating the level

1 of pain she was experiencing because one would expect doctors to  
2 "prescribe stronger pain medication and/or more aggressive therapy  
3 such as surgery." Id. The ALJ found "no objective evidence to  
4 explain the claimant's back pain." Id. The ALJ rejected the  
5 opinions of Drs Folan and Louie because of lack of evidence,  
6 evidence of exaggeration, the assessments of the state agency  
7 physicians, the contrary opinion testimony of the ME and the  
8 appearance that they "merely accepted her complaints at face  
9 value." Id. The ALJ stated that he was "impressed by the fact  
10 that the claimant drives herself to school, attends class for at  
11 least one hour, does her household chores; and takes a daily walk  
12 with her dog." AR 19, 115-16.

13           The ALJ found that Morillas "has no impairment \* \* \* that  
14 precluded the performance of her past relevant work as a [w]aitress  
15 and [c]ashier \* \* \* " and found Morillas not disabled at step four.  
16 AR 20-21. The ALJ found that as part of her past work Morillas  
17 performed the duties of the following jobs: security guard (DOT  
18 372.667-034; cashier (DOT 211.462-010); bartender helper (DOT  
19 312.687-010); manager (DOT 187.167-126) and waitress (DOT 311.477-  
20 018). AR 19-20. The ALJ found at step four that Morillas's RFC  
21 allowed her to work as a waitress and cashier. AR 20. But even if  
22 he did not find Morillas disabled at step four, the ALJ would  
23 alternatively have found her not disabled at step five. Id. He  
24 found "[e]ven if [she] were limited to standing and walking less  
25 than [two] hours in an [eight-]hour day, [she], with transferable  
26 skills, could perform the job of [c]heck [c]ashier (DOT 211.462-  
27 026), which is present in significant numbers in the national  
28 economy." AR 21.

1 Morillas unsuccessfully requested review with the Appeals  
2 Council and the ALJ's decision became the final decision of the  
3 SSA. AR 5-7. Morillas timely commenced the instant action seeking  
4 judicial review.

6 II

7 The court's jurisdiction is limited to determining  
8 whether the SSA's denial of benefits is supported by substantial  
9 evidence in the administrative record. 42 USC § 405(g). A  
10 district court may overturn a decision to deny benefits only if the  
11 decision is not supported by substantial evidence or if the  
12 decision is based on legal error. Thomas v Barnhart, 278 F3d 947,  
13 954 (9th Cir 2002). The Ninth Circuit defines "substantial  
14 evidence" as "more than a mere scintilla but less than a  
15 preponderance." Id. "[I]t is relevant evidence which, considering  
16 the record as a whole, a reasonable person might accept as adequate  
17 to support a conclusion." Id. Determinations of credibility,  
18 resolution of conflicts in medical testimony and all other  
19 ambiguities are to be resolved by the ALJ. Id. If evidence exists  
20 to support more than one rational interpretation, the court must  
21 defer to that chosen by the ALJ. Morgan v Commissioner of the  
22 Social Security Administration, 169 F3d 595, 599 (9th Cir 1999).

23 "Disabled" is defined as "unable to do any substantial  
24 gainful activity by reason of any medically determinable physical  
25 or mental impairment which can be expected to result in death or  
26 which has lasted or can be expected to last for a continuous period  
27 of not less than 12 months." 20 CFR § 404.1527.

28 SSA regulations provide a five-step sequential evaluation

1 process to determine whether a claimant is disabled within the  
2 meaning of the Act. 20 CFR §§ 404.1520, 416.920. First, the ALJ  
3 determines whether the claimant is currently employed in  
4 substantial gainful activity. If not, then the ALJ determines at  
5 step two whether the claimant has a "severe" impairment or  
6 combination of impairments significantly limiting his or her  
7 physical or mental ability to do basic work activities. If the  
8 claimant does not have such an impairment or combination of  
9 impairments, then the ALJ determines at step three whether the  
10 claimant has an impairment that meets or equals the impairments in  
11 the Listing of Impairments, found at 20 CFR Pt 404, Subpt P, App 1.  
12 If so, the analysis ends with a finding that the claimant is  
13 disabled. If not, then the ALJ determines, at step four, whether  
14 the claimant has the RFC to perform his or her past relevant work.  
15 If so, the claimant is deemed not disabled. But if the claimant is  
16 unable to perform his or her past relevant work, then the ALJ  
17 proceeds to step five to determine whether the claimant has the RFC  
18 to perform any other work which exists in substantial numbers in  
19 the national economy. 20 CFR § 404.1520.

20  
21 III

22 Morillas contends that the final decision of the ALJ is  
23 in error because the ALJ: (1) failed to render a finding on how her  
24 obesity factored into her RFC determination; (2) erred by giving  
25 greater weight to the opinions of non-treating physicians than to  
26 the opinions of treating physicians without setting forth specific  
27 and legitimate reasons for doing so; (3) erred in improperly  
28 rejecting her subjective complaints of pain; (4) erred by posing a

1 hypothetical question to the VE without including all the  
2 limitations noted in the record; and (5) erred in finding Morillas  
3 "not disabled" at step four of the sequential analysis even though  
4 it was determined that she could not perform her past work as a  
5 bartender. The court finds merit only in Morillas's last argument,  
6 which defendant concedes, but the error does not warrant reversal  
7 or remand for the reasons explained below.

8  
9 A

10 Morillas argues that the ALJ failed to render a finding  
11 on how her obesity factored into the ALJ's RFC analysis and that  
12 such a failure is inconsistent with Social Security Ruling (SSR)  
13 02-1p. SSR 02-1p explains the SSA's policy concerning the  
14 evaluation of obesity in disability claims after the SSA removed  
15 obesity as a listed impairment. It provides that disability should  
16 be found only if obesity causes musculoskeletal, cardiovascular or  
17 respiratory complications. SSR 02-1p provides that obesity is  
18 considered a severe impairment "when, alone or in combination with  
19 another medically determinable physical or mental impairment(s), it  
20 significantly limits an individual's physical or mental ability to  
21 do basic work activities." Even though obesity is not a listed  
22 impairment, the ALJ must determine if a claimant's combined  
23 impairments equal a listed impairment. Burch v Barnhart, 400 F3d  
24 676, 683 (9th Cir 2005). The claimant, however, still carries the  
25 initial burden of proving a disability. Id.

26 The record does not indicate that Morillas's obesity  
27 limited her functioning. None of her doctors indicated that her  
28 obesity was the cause of any of her limitations. An ALJ is not

1 required to discuss the combined effects of a claimant's  
2 impairments or compare them to any listing in an equivalency  
3 determination unless the claimant presents evidence in an effort to  
4 establish equivalence. See Lewis v Apfel, 236 F3d 503, 514 (9th  
5 Cir 2001). The ALJ did not err in failing to consider obesity in  
6 the sequential evaluation process because Morillas failed to point  
7 to any evidence of limitations attributable to her obesity. See  
8 Burch, 400 F3d at 683.

10 B

11 Morillas next argues that the ALJ erred by giving greater  
12 weight to the opinions of non-treating physicians Madiredi and  
13 Tambellini than the opinions of treating physicians Louie and Folan  
14 without setting forth specific and legitimate reasons. The opinion  
15 of examining and treating doctors may not be rejected without  
16 "specific and legitimate" reasons supported by substantial evidence  
17 in the record, and the uncontradicted opinion of either may only be  
18 rejected for "clear and convincing" reasons. Lester v Chater, 81  
19 F3d 821, 831 FN2 (9th Cir 1995).

20 The ALJ provided "specific and legitimate" reasons for  
21 rejecting the opinions of the treating physicians in favor of the  
22 opinions of the non-treating physicians. The ALJ rejected the  
23 opinions of the two treating physicians because of a lack of  
24 objective evidence, evidence of exaggeration, the assessments of  
25 the state agency physicians and the contrary opinion testimony of  
26 the ME. AR 19. The ALJ considered, along with the objective  
27 medical evidence, evidence of Morillas's daily activities,  
28 functional restrictions, use of medication and treatments



1 prescribed in determining that Morillas was exaggerating her level  
2 of pain and that her treating physicians "merely accepted her  
3 complaints at face value." Id. The ALJ also relied on the expert  
4 testimony of the ME in finding that the objective evidence did not  
5 support Morillas's complaints. Id. Substantial evidence supported  
6 the ALJ's reasons for favoring the opinions of the non-treating  
7 physicians over those of the treating physicians.

## C

8  
9  
10 Morillas next argues that the ALJ erred in improperly  
11 rejecting her subjective complaints of pain. To determine whether  
12 a claimant's testimony regarding subjective pain or symptoms is  
13 credible, an ALJ must engage in a two-step analysis. First, the  
14 ALJ must determine whether the claimant has presented objective  
15 medical evidence of an underlying impairment "which could  
16 reasonably be expected to produce the pain or other symptoms  
17 alleged." Bunnell v Sullivan, 947 F2d 341, 344 (9th Cir 1991).  
18 The claimant "need not show that her impairment could reasonably be  
19 expected to cause the severity of the symptom she has alleged; she  
20 need only show that it could reasonably have caused some degree of  
21 the symptom." Smolen v Chater, 80 F3d 1273, 1282 (9th Cir 1996).  
22 Next, "unless an ALJ makes a finding of malingering based on  
23 affirmative evidence thereof, he or she may only find an applicant  
24 not credible by making specific findings as to the credibility and  
25 stating clear and convincing reasons for each." Vertigan v Halter,  
26 260 F3d 1044, 1049 (9th Cir 2001). But if a claimant "is able to  
27 spend a substantial part of [her] day engaged in pursuits involving  
28 the performance of physical functions that are transferable to a

work setting, a specific finding as to this fact may be sufficient to discredit a claimant's allegations." Morgan, 169 F3d at 600.

The ALJ stated that he was "impressed by the fact that the claimant drives herself to school, attends class for at least one hour, does her household chores; [sic] and takes a daily walk with her dog." AR 19, 115-16. The ALJ also determined that if Morillas's pain was as severe as she claimed, one would expect her physicians to "prescribe stronger pain medication and/or more aggressive therapy such as surgery." Id. "Although lack of medical evidence cannot form the sole basis for discounting pain testimony, it is a factor that the ALJ can consider in his credibility analysis." Burch, 400 F3d at 681. Morillas testified that she only took 800 milligrams of ibuprofen for pain and pentazocine lactate once a day at bedtime or during episodes of greater discomfort, which occurred three or four times a month. Like the ME, the ALJ stated that he thought that there were "signs of exaggeration." AR 19, 397. Based on the evidence, it was reasonable for the ALJ to infer that Morillas was exaggerating her pain. The ALJ's reasons for rejecting Morillas's pain testimony were sufficiently supported by the evidence in the record and set forth in proper detail.

D

Morillas next argues that the ALJ erred by posing hypotheticals to the VE that did not include: 1) limitation in performing repetitive hand motions and 2) side effects caused by the medications Morillas was taking. The ALJ asked the VE whether an individual with the same education and vocational background as

1 Morillas who could "do light work with no overhead lifting, no  
2 overhead reaching, occasional stooping, kneeling, crouching and  
3 crawling, and occasional climbing" could perform Morillas's past  
4 work. AR 402. A hypothetical posed by an ALJ must consider all of  
5 the claimant's limitations. Magallanes v Bowen, 881 F2d at 747,  
6 756 (9th Cir 1989). But when there is no clear objective medical  
7 evidence of an impairment, the ALJ need not include that impairment  
8 in hypotheticals if the ALJ determines that the claimant is not  
9 credible and provides specific reasons justifying his or her  
10 decision not to find the claimant's testimony about alleged  
11 impairments credible. Thomas, 278 F3d at 959-960.

12       The record contains inconsistent findings on Morillas's  
13 wrist impairments. While Dr Folan indicated that he thought  
14 Morillas had significant limitations with reaching, handling and  
15 fingering, Dr Louie indicated that he thought Morillas had no  
16 significant limitations with reaching, handling and fingering. AR  
17 343, 348. Dr Tambellini noted no limitations in handling or  
18 fingering. AR 254. Dr Sonka-Maarek stated that she thought it was  
19 questionable whether Morillas actually suffered from CTS. AR 390.  
20 The ALJ provided several reasons mentioned above for rejecting the  
21 opinions of Drs Folan and Louie, who themselves had conflicting  
22 opinions. Because the evidence did not clearly indicate that  
23 Morillas had difficulty reaching, handling and fingering, the ALJ  
24 did not err in omitting such difficulties in his hypothetical.

25       The ALJ also did not err in omitting the side effects of  
26 Morillas's medications in his hypothetical. When a claimant never  
27 raises complaints with doctors, the ALJ is not obligated to include  
28 those complaints in hypotheticals. See Greger v Barnhart, 464 F3d

1 968, 973 (9th Cir 2006). Morillas did not complain to her  
2 physicians that her medications made her drowsy or interfered with  
3 her functioning; the ME did not mention that Morillas's medications  
4 negatively affected her, only that they "do cause cognitive side  
5 effects." AR 397. Absent medical evidence that Morillas suffered  
6 side effects from her medications, however, the ALJ did not err by  
7 omitting them from his hypotheticals.

8  
9 E

10 Finally, Morillas argues that the ALJ erred by finding her  
11 "not disabled" at step four of the sequential evaluation, contending  
12 that the evidence established that she was capable of performing  
13 only some, but not all, aspects of her past relevant work. The ALJ  
14 properly found that Morillas could work as a waitress or a cashier.  
15 AR 20. But because Morillas could not perform her past relevant  
16 work of bartending, the ALJ should not have found that Morillas  
17 could perform her past relevant work at step four. 20 CFR §§  
18 404.1520. Defendant concedes this point.

19 The ALJ, however, properly determined alternatively at  
20 step five that Morillas could perform other work, namely waitressing  
21 and cashiering. AR 21. After determining that a claimant cannot  
22 perform past relevant work, the ALJ is "free to consider \* \* \* the  
23 skills which the claimant has previously developed in order to  
24 determine whether the applicant is able to perform other available  
25 work." Valencia v Heckler, 751 F2d 1082, 1087 (9th Cir 1985). A  
26 mischaracterization of past relevant work is harmless when a  
27 claimant can perform other work. Browner v Secretary of Health and  
28 Human Services, 839 F2d 432, 433 (9th Cir 1988).

IV

Because substantial evidence and correct legal principles support the ALJ's decision, the court DENIES plaintiff's motion for summary judgment (Doc #20) and GRANTS defendant's motion for summary judgment (Doc #21).

The clerk is directed to enter judgment in favor of the defendant and to close the file.

IT IS SO ORDERED.



\_\_\_\_\_  
VAUGHN R WALKER  
United States District Chief Judge